

(1968) 08 OHC CK 0029
In the Orissa High Court
Case No : Second Appeal No. 454 of 1964

Bairagi Charan Mohanti

APPELLANT

Vs

Basanta Priya Devi and Others

RESPONDENT

Date of Decision : 06-08-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92, Order 21 Rule 92(3)
Orissa Tenancy (Amendment) Act, 1948 — Section 228 , 228A, 228A(4)

Citation : AIR 1969 Ori 67 : (1969) 35 CLT 98

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : H.G. Panda, for the Appellant; L.K. Dasgupta and P. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—The suit had been filed in respect of A and B schedules lands and was decreed in respect of A schedule property. No appeal was filed and the matter became final. Only B schedule property constitutes the subject-matter of the second appeal. Facts relating to B schedule are stated hereunder.

Defendant 1 is the recorded tenant of B schedule property with an area of 0.57 acre. On 1-5-46 a rent suit filed by the landlord against defendant 1 in respect of this property was decreed. On 30-9-46 defendant 1 executed an unregistered kabala in respect of this property in favour of the plaintiff. On 31-3-48 B schedule property was sold in court auction in Execution Case No. 1110 of 1947-48 in execution of the decree for rent. Defendant 3 purchased it in court auction. On 1-6-48 plaintiff filed an application u/s 228 of the Orissa Tenancy Act (hereinafter referred to as the Act) for setting aside the auction sale on the ground of material irregularity and fraud in publishing and conducting the sale. Plaintiff filed T. S. No. 44/49 against defendant 1 for specific performance of the unregistered kabala dated 30-9-46 and the suit was decreed on 9-2-51. On 17-12-51 the

Court executed the sale deed (Ex. 2) in favour of the plaintiff on behalf of defendant 1 in Execution Case No. 135/51. On 4-8-52 the Executing Court dismissed the application u/s 228 of the Act (Ex. 10). It held that the sale proclamation had not been published in the locality and there was material irregularity in conducting the sale and that the property was undervalued resulting in substantial injury. It, however, dismissed the application on the finding that the plaintiff had no interest in the disputed land till 17-12-51 when the sale deed (Ex. 2) was executed by the Court in her favour. She filed Execution Appeal No. 38 of 1952-53 which was dismissed on 22-12-52 (Ex. 9). The appellate Court recorded many queer findings. It held that the kabala, though executed on 17-12-51 and registered on 20-12-51, took effect from 30-9-46, the date of execution of the unregistered kabala, and the plaintiff was to be deemed to be the tenant on that date. According to it, the decree for arrears of rent was a money decree and it did not affect plaintiff's interest. It, however, held that the plaintiff ought to have filed an application under Order 21, Rule 90, C. P. C. and not u/s 228 of the Act which did not apply unless the sale was in execution of a rent decree. As the application u/s 228 had been filed beyond thirty days, it dismissed the application as being barred by limitation. Being disappointed plaintiff filed the present suit on 2-11-53 for declaration of title, confirmation of possession and permanent injunction, or in the alternative, for recovery of possession. Defendant 3 alone contested the suit.

The learned Munsif recorded the following findings; (i) Title did not pass to the plaintiff prior to 17-12-51, the date of execution of Ex. 2. Plaintiff's purchase could not prevail against the purchase by defendant 3 in auction sale; and (ii) Plaintiff was in possession but without title. He accordingly dismissed the suit without costs.

In appeal filed by the plaintiff, the only point urged was that the purchase by defendant 3 in court auction was vitiated by fraud and, as such, defendant 3 derived no title. It is to be noted that initially fraud was not pleaded in the plaint and no issue was framed thereon. The learned Sub-Judge entertained this ground, framed an issue on the question of fraud and directed the trial Court to allow the plaintiff to amend the plaint on the question of fraud and to give full opportunity to the parties to lead evidence and then to return a finding. Obviously this power was exercised under Order 41, Rule 25, C. P. C. The appeal was kept pending in the file of the lower appellate Court until the finding on the question of fraud was returned by the trial Court. The trial Court in accordance with the aforesaid direction allowed the plaint to be amended. Para 10 of the plaint mentioned the particulars of fraud and an additional written statement was filed denying fraud. The only additional evidence, after remand, on the question of fraud was that P. W. 1, D. W. 1 and D. W. 3 were recalled and further examined. The trial Court returned a finding that fraud was committed. The lower appellate Court affirmed that finding and passed a decree in favour of the plaintiff in respect of B schedule property. Plaintiff's possession was confirmed and a permanent injunction was issued against defendant 3. Against the

appellate decree, the second appeal has been filed by defendant 3.

2. Mr. Panda in support of the appeal raised the following contentions:

(i) The learned Sub-Judge exercised his jurisdiction illegally in framing an issue on the question of fraud which was not in the original plaint and in remanding the case under Order 41, Rule 25, C. P. C., and

(ii) Accepting the entire evidence on record, no fraud has been established. All that the plaintiff purported to have proved was material irregularity and fraud in publishing or conducting the sale. The auction sale cannot be set aside. Section 228-A, Sub-section (4) of the Act is a bar to it unless fraud, other than those mentioned in Section 228 of the Act, is established.

Both the contentions require careful examination.

3. Before dealing with Mr. Panda's argument, it would be proper to dispose of an argument of Mr. Dasgupta that the purchase by defendant 3 in Court auction was benami for defendant 1. Such a plea was never canvassed before the Courts below who have recorded no findings thereon. The plea is not a pure question of law but a mixed question of law and fact which cannot be permitted to be raised for the first time in second appeal. It is accordingly rejected.

4. The first contention of Mr. Panda that the learned Sub-Judge exercised jurisdiction illegally in framing an issue on the question of fraud, when there was no pleading, is well founded. All the contentions canvassed before the trial Court were abandoned before the lower appellate Court and a new point on the question of fraud was raised for the first time. There was no justification in framing an issue and directing the trial Court to allow the plaint to be amended and to give full opportunities to the parties to lead evidence on the question of fraud. An altogether new case had to be tried.

This very argument was advanced before the learned Sub-Judge. He rejected it by saying that as defendant 3 did not file any revision against his order remanding the case under Order 41, Rule 25, C. P. C., the point was not maintainable. So far as the Sub-Judge is concerned, his view is correct. After having passed that order, he had subsequently no power to review his own judicial order and take a different view while disposing of the appeal finally. His view is, however, subject to attack in second appeal.

5. Section 105, C. P. C. runs thus-

105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in Sub-section (1) where any party aggrieved by an order of remand made after the commencement of this Code

from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

No appeal lies against an order of remand under Order 41, Rule 25, C. P. C. Sub-section (2) of Section 105 is no bar in this particular case for urging the illegality of the remand order in the second appeal. Here the remand order is an irregularity affecting the decision of the case. Such a point can be urged where the decree is appealed from.

6. Even assuming that the learned Sub-Judge exercised jurisdiction properly in giving opportunity to the plaintiff to plead and prove a case of fraud, he should not have overlooked Section 228-A, Sub-section (4) of the Act which lays down that no suit to set aside an order made under this section shall be brought by any person against whom such order is made. The order made u/s 228-A, Sub-section (1) is to confirm the sale whereupon the sale shall become absolute where no application is made under Sub-section (1) of Section 228 within thirty days from the date of sale or where such application is made and disallowed.

In this case, an application had been made u/s 228 of the Act and it had been disallowed resulting in confirmation of the sale which became absolute. Such a sale cannot be set aside by the plaintiff against whom the order was made under Sub-section (4) of Section 228-A.

Section 228 of the Act corresponds to Order 21, Rules 89 and 90, C. P. C. Section 228-A more or less corresponds to Order 21, Rule 92, Order 21, Rule 92 Sub-rule (3) corresponds to Sub-section (4) of Section 228-A. It says that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made. It has been held that a suit to set aside a sale in execution on grounds other than those covered by Rules 89, 90 and 91, is not within the prohibition of Sub-rule (3) and is, therefore, not barred by it. If the sale is attacked on wider grounds of fraud not covered by Rule 90, or is attacked on ground of want of jurisdiction, a suit to set aside such a sale is not barred by this rule. *Vasudeva Kavv v. Maninaika*, AIR 1953 Mad 683 and *Bhagwan Das Marwari and Others Vs. Suraj Prasad Singh and Others*. It is not necessary to multiply authorities. There is hardly any conflict on this point. Mr. Dasgupta rightly did not dispute the correctness of this proposition.

7. The next question for consideration is whether fraud on grounds wider than those pleaded u/s 228 of the Act has been proved in this case. The following facts in support of fraud are placed by Mr. Dasgupta. Defendant 3 is the cousin of D. W. 1, the gumasta of the landlord, at whose instance the decree for rent and the execution sale took place. Both of them live in the same house. Their village is two miles away from the land in dispute. From these facts and the fraudulent suppression of sale proclamation, even if accepted as true, a case of fraud on the wider footing has not been established. The fraud in the publication or conduct of sale is not enough to set aside the auction sale by a suit. It has been held by this Court in *Smt. Brajabala Das Vs. Radha Kamal Das and Others*, that fraud like any

other charges of criminal offence. whether made in Civil or Criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion or conjecture. Even if defendant 3 and D. W. 1 are cousins and remain in the same house, it does not follow that defendant 3 was a party to the fraud resulting in suppression of the sale proclamation. Defendant 3 cannot suffer if the property was sold out by fraudulent suppression of the sale proclamation at the instance of the decree-holder. It must, be established that the auction-purchaser (defendant 3) was a party to the entire scheme of fraud and purchased the property in pursuance of that scheme. The fact that the land is at a distance of two miles from the village of defendant 3, without anything more, does not establish any element of fraud. No question was put to defendant 3 as to why he purchased the land at a distance of two miles. He could have offered his own explanation. The judgment of the learned Sub-Judge setting aside the sale on ground of fraud, coming within the purview of Order 21, Rule 90, C. P. C. or of Section 228 of the Act and not on wider ground of fraud, is contrary to law.

8. In the result, the judgment of the lower appellate Court is set aside and the plaintiff's suit is dismissed. The second appeal is allowed. In the circumstances parties to bear their own costs throughout.